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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 GORDON E. DUNFEE, et al.,  
11 Plaintiffs,  
12 v.  
13 TRUMAN CAPITAL ADVISORS, LP,  
14 et al.,  
15 Defendants.

Civil No. 12-cv-1925-BEN (DHB)

**ORDER DENYING PLAINTIFFS'  
REQUEST FOR EXTENSION OF  
DISCOVERY CUTOFF**

16 On September 27, 2013, Plaintiffs filed a document entitled "Plaintiffs' Notice of  
17 Motions and Motions to Quash the Subpoena for the Hurwitz Deposition and to Extend the  
18 Discovery Cut Off Dates." (ECF No. 40.) On September 30, 2013, the Court issued an order  
19 advising Plaintiffs that their motion to continue the discovery cut-off should have been filed  
20 as a separate joint motion by the parties. (ECF No. 41.) The Court construed Plaintiffs'  
21 request for a continuance of the discovery cut-off as an *ex parte* application to continue the  
22 discovery cut-off. (*Id.*) Defendants were ordered to file any opposition to Plaintiffs' *ex*  
23 *parte* application no later than October 3, 2013. (*Id.*) On October 3, 2013, Defendants  
24 Truman Capital Advisors, LP, TruCap Grantor Trust 2010-2 and Marix Servicing, LLC  
25 (collectively "Truman") filed an opposition. (ECF No. 43.) On October 7, 2013, Defendants  
26 Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage (collectively "Wells Fargo") filed  
27 a joinder to the opposition. (ECF No. 44.)

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1 Having considered the arguments of the parties and the applicable law, and for the  
 2 reasons set forth herein, the Court **DENIES** Plaintiffs' request for an extension of the  
 3 discovery cut-off.

#### 4 **DISCUSSION**

5 Discovery has been open in this case since October 2012. On November 1, 2012, the  
 6 Court issued a Scheduling Order setting, among other things, a June 28, 2013 deadline to  
 7 complete all discovery. (ECF No. 29 at ¶ 5.) On April 30, 2013, in light of Wells Fargo's  
 8 recent appearance in the action, the Court issued a Modified Scheduling Order in extending  
 9 the discovery cut-off to October 4, 2013. (ECF No. 34 at ¶ 5.)

10 On September 27, 2013, Plaintiffs filed their request to continue the discovery cutoff  
 11 until November 8, 2013. (ECF No. 40.) Plaintiffs contend good cause exists for the  
 12 requested continuance because: (1) Defendants will suffer no prejudice because the requested  
 13 continuance is very brief and the impact on the proceedings will be minimal; (2) there will  
 14 be prejudice to Plaintiffs if they cannot complete their discovery; (3) Plaintiffs have acted  
 15 in good faith; and (4) "extenuating circumstances" justify a brief continuance. The  
 16 extenuating circumstances set forth by Plaintiffs are: (1) Plaintiff Gordon Dunfee (who is  
 17 also representing Plaintiffs in this action) has been acting as a court-appointed receiver to  
 18 operate the Santee Swap Meet for the past eighteen months which has required constant  
 19 attention; (2) the receivership ended on September 6, 2013 which required Mr. Dunfee to  
 20 prepare a Final Account and Report requiring a detailed financial and operational accounting  
 21 of the last eighteen months; (3) Mr. Dunfee works full time and does not have any support  
 22 staff; (4) Mr. Dunfee had to assist his elderly parents' relocation to an assisted living facility  
 23 in September 2013; and (5) Plaintiffs' son was married on September 13, 2013 which  
 24 required "enormous planning and time."

25 Truman's opposition to Plaintiffs' request contends that the discovery cut-off should  
 26 not be extended because (1) Plaintiffs failed to properly meet and confer prior to filing their  
 27 request; (2) Plaintiffs violated the undersigned Magistrate Judge's Civil Chambers Rules by  
 28 not filing a joint motion for determination of discovery dispute; (3) Plaintiffs have failed to

1 show good cause for a continuance; and (4) Truman will be prejudiced if the discovery cut-  
 2 off is extended because the dispositive motion filing deadline is set for October 29, 2013, and  
 3 Truman would be prejudiced by not having sufficient time to assess new discovery prior to  
 4 filing an anticipated motion for summary judgment.

5 “The decision to modify a scheduling order is within the broad discretion of the  
 6 district court.” *Mondares v. Kaiser Found. Hosp.*, No. 10-CV-2676-BTM(WVG), 2011 U.S.  
 7 Dist. LEXIS 128413, at \*3 (citing *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 607  
 8 (9th Cir. 1992)). Federal Rule of Civil Procedure 16(b)(4) provides that the Court’s  
 9 scheduling order “may be modified only for good cause and with the judge’s consent.” FED.  
 10 R. CIV. P. 16(b)(4).<sup>1</sup> “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence  
 11 of the party seeking the amendment. The district court may modify the pretrial schedule ‘if  
 12 it cannot reasonably be met despite the diligence of the party seeking the extension.’”  
 13 *Johnson*, 975 F.2d at 609 (quoting FED. R. CIV. P. 16 advisory committee’s notes (1983  
 14 amendment)) (citations omitted). “[C]arelessness is not compatible with a finding of  
 15 diligence and offers no reason for a grant of relief.” *Id.* (citations omitted). “Although the  
 16 existence or degree of prejudice to the party opposing the modification might supply  
 17 additional reasons to deny a motion, the focus of the inquiry is upon the moving party’s  
 18 reasons for seeking modification. *Id.* (citation omitted). “If that party was not diligent, the  
 19 inquiry should end.” *Id.*; see also *J.K.G. v. Cnty. of San Diego*, No. 11cv0305 JLS(RBB),  
 20 2012 U.S. Dist. LEXIS 126195, at \*3 (S.D. Cal. Sept. 5, 2012) (“The court should not amend  
 21 a scheduling order that was issued unless the party requesting the modification can show  
 22 good cause.”) (citing FED. R. CIV. P. 16(b)(4)); *Mondares*, 2011 U.S. Dist. LEXIS 128413,  
 23 at \*4 (“If the party seeking modification was not diligent in his or her pretrial preparations,  
 24 the inquiry should end there and the measure of relief sought from the Court should not be  
 25 granted.”) (citing *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)). “The  
 26 party seeking to continue or extend the deadlines bears the burden of proving good cause.”

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 28 <sup>1</sup> Plaintiffs’ discussion about Federal Rule of Civil Procedure 6 and excusable  
 neglect (see ECF No. 40 at 8:20-28, 9:11-16) is inapplicable where, as here, a party seeks  
 to modify a court-issued scheduling order. Such a request is governed by Rule 16(b).

1 *Id.* (citing *Zivkovic*, 302 F.3d at 1087; *Johnson*, 975 F.2d at 608).

2 In addressing the diligence requirement, a sister court has noted:

3 [T]o demonstrate diligence under Rule 16's "good cause" standard, the movant  
4 may be required to show the following: (1) that she was diligent in assisting the  
5 Court in creating a workable Rule 16 order; (2) that her noncompliance with a  
6 Rule 16 deadline occurred or will occur, notwithstanding her diligent efforts to  
7 comply, because of the development of matters which could not have been  
reasonably foreseen or anticipated at the time of the Rule 16 scheduling  
conference; and (3) that she was diligent in seeking amendment of the Rule 16  
order, once it became apparent that she could not comply with the order.

8 *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citations omitted); *see also*  
9 *Rich v. Shrader*, No. 09-CV-0652-AJB (BGS), 2013 U.S. Dist. LEXIS 98184, at \*5-6 (S.D.  
10 Cal. July 11, 2013) ("In order to demonstrate good cause, a party must demonstrate its  
11 diligence in taking discovery since the case management conference, its diligence in  
12 propounding or noticing the particular outstanding discovery, and explain why the parties  
13 could not exchange the particular discovery before the discovery cut-off date.").

14 "Allowing parties to disregard the instructions of a scheduling order would undermine  
15 the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and  
16 reward the indolent and cavalier. Rule 16 was drafted to prevent this situation." *Sokol*  
17 *Holdings, Inc. v. BMB Munai, Inc.*, 05 cv 3749 (KMW)(DCF), 2009 U.S. Dist. LEXIS  
18 100478, at \*17 (S.D.N.Y. Oct. 28, 2009) (citation omitted) (internal quotation marks  
19 omitted).

20 For the reasons stated below, the Court finds that good cause does not exist to extend  
21 the discovery cut-off because Plaintiffs have failed to show they have been diligent in  
22 seeking discovery from Defendants.

23 First, Plaintiffs have not demonstrated any efforts to obtain discovery from Defendants  
24 until the very eve of discovery.<sup>2</sup> Despite having an entire year to complete discovery,

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26 <sup>2</sup> Plaintiffs indicate there has been a "continuing discovery dispute" between  
27 Plaintiffs and Truman regarding the production of documents, and that "Plaintiffs have  
28 been asking Truman's counsel for many months for the documents requested by  
Plaintiffs." (ECF No. 40 at 11:22-24.) However, it is not clear whether Plaintiffs  
formally served Rule 34 document requests or whether Plaintiffs have been attempting to  
informally obtain the documents. In any event, any motion to compel production from

1 Plaintiffs waited until September 17, 2013 (seventeen days before the discovery cut-off) to  
2 request available dates to conduct depositions of Truman employees. Further, Plaintiff  
3 waited until September 26, 2013 (eight days before the discovery cut-off) to serve any  
4 written discovery on Well Fargo or notice the depositions of Truman and Wells Fargo  
5 employees. Waiting until the final two weeks of the discovery period to commence  
6 discovery efforts cannot be viewed as having pursued discovery with diligence. Indeed, the  
7 facts presently before the Court bear striking similarity to the situation presented to the  
8 Honorable William V. Gallo in *Mondares*. Judge Gallo stated:

9 Except for the flurry of deposition notices served essentially on the eve of the  
10 fact discovery cut-off, Plaintiff has not engaged in any discovery to date. The  
11 deposition notices she served a mere two weeks before the discovery cut-off  
12 were her first attempts at any discovery at all. Essentially, although Plaintiff  
13 had the opportunity to conduct discovery [for over five months], she waited  
14 until the sixteenth day before the deadline was set to pass before she engaged  
in any discovery at all. And then, she bombarded Defendants with multiple  
depositions notices, two of which contained hundreds of PMK topics. This sort  
of delay is the antithesis of diligence, and, besides her own failure to do  
discovery, Plaintiff provides no reasonable reason why she could not meet the  
discovery deadline.

15 2011 U.S. Dist. LEXIS 128413, at \*7.

16 Second, Plaintiffs have not explained why they did not go forward with depositions  
17 on any of the numerous dates and in the locations provided by Truman's counsel. Indeed,  
18 despite Plaintiffs' delay until the close of discovery to even request available dates,  
19 Truman's counsel quickly determined availability for multiple out-of-state depositions and  
20 provided those dates to Plaintiff. Notwithstanding the good faith cooperation of Truman's  
21 counsel, Plaintiffs selected unavailable dates for the depositions, and they noticed the  
22 depositions for San Diego despite being advised of the deponents' out-of-state residency.

23 Third, good cause is not established when a party demonstrates they were preoccupied  
24 attending to other matters. Here, Mr. Dunfee contends he was too busy to engage in  
25 discovery because he was working a full-time job as a court-appointed receiver throughout  
26 the discovery period, he spent "enormous time" planning his son's September 13, 2013  
27 wedding, and he was compelled to help his elderly parents relocate to an assisted living

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Truman is untimely pursuant to Section IV(C)-(D) of the Court's Civil Chambers Rules.

1 facility last month. However, as Judge Gallo stated in *Mondares*, “a busy schedule do[es]  
 2 nothing to advance Plaintiff’s burden to show she was diligent in this case. Quite the  
 3 contrary, these actually militate against a finding of diligence, as counsel essentially admitted  
 4 she was not diligent in this case because she was busy litigating other cases.” *Id.* at \*6.  
 5 Similarly, the fact that Mr. Dunfee was preoccupied with other work and personal matters  
 6 is insufficient to establish diligence and good cause.

7 Furthermore, Mr. Dunfee’s busy schedule<sup>3</sup> was known well in advance of the  
 8 discovery cut-off. Indeed, Mr. Dunfee has been operating the Santee Swap Meet as a court-  
 9 appointed receiver since before this action was removed to federal court in August 2012, and  
 10 his work situation was known both at the time the Court issued its original Scheduling Order  
 11 on November 1, 2013 and when the Court modified the Scheduling Order on April 30, 2013.  
 12 At no time prior to the eve of the discovery cut-off did Plaintiffs advise the Court that they  
 13 would be unable to comply with the established deadlines due to the receivership obligations.  
 14 Similarly, at no time prior to the eve of the discovery cut-off did Plaintiffs advise the Court  
 15 that their son’s wedding plans would prevent them from conducting discovery in a timely  
 16 manner, despite Plaintiffs’ admission that the wedding required “enormous time and  
 17 planning.” *See id.* at \*8 (“Despite knowing that the discovery cut-off was fast approaching  
 18 and she had not conducted any discovery, Plaintiff made no attempt to seek an extension  
 19 before it passed.”).

20 Fourth, Plaintiffs’ contention that they will be prejudiced if an extension is not granted  
 21 is unavailing. “A party who fails to pursue discovery in the face of a court ordered cut-off  
 22 cannot plead prejudice from his own inaction.” *Rosario v. Livaditis*, 963 F.2d 1013, 1019  
 23 (7th Cir. 1992).

24 Finally, Plaintiffs failed to adequately meet and confer with counsel for Truman prior  
 25 to seeking the instant request. The parties disagree whether Plaintiffs adequately met and  
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27 <sup>3</sup> The Court questions whether Mr. Dunfee’s schedule was so busy so as to make  
 28 compliance with the Court’s discovery cut-off impossible, particularly in light of  
 Truman’s representation that Defendants accommodated Plaintiffs’ scheduling conflicts,  
 including their summer vacation.



1 conferred concerning Plaintiffs' request for a continuance of the discovery cut-off. Based  
 2 on the record before the Court, it appears Mr. Dunfee met with counsel for Wells Fargo on  
 3 September 27, 2013 to discuss, among other things, Plaintiffs' request regarding the  
 4 discovery cut-off. While this meeting satisfied the meet and confer requirement set forth in  
 5 Local Civil Rule 26.1 and Section IV(A) of the undersigned Magistrate Judge's Civil  
 6 Chambers Rules <sup>4</sup> with respect to Wells Fargo, Plaintiffs' efforts were insufficient with  
 7 respect to Truman. Although Plaintiffs contend they made a "reasonable effort" to meet and  
 8 confer with Truman's counsel (*see* ECF No. 40 at 10:7-8), the Court finds that sending an  
 9 email to Truman's counsel on the morning of the planned meeting with Wells Fargo's  
 10 counsel is insufficient. Not only did Plaintiffs provide little more than two hours notice to  
 11 Truman's counsel, but Plaintiffs made no effort to schedule a mutually convenient time to  
 12 meet and confer with Truman's counsel prior to filing their request for a discovery extension.  
 13 *See Brantley v. Borg-Warner Morse Tec, Inc.*, No. 12CV540-GPC(JMA), 2013 U.S. Dist.  
 14 LEXIS 132275, at \*13 (S.D. Cal. Sept. 13, 2013) ("Plaintiff's counsel should have instead,  
 15 timely and with reasonable notice, convened an 'all party' conference during which  
 16 Plaintiff's proposal could have been fully and openly discussed by all affected.").

### 17 CONCLUSION

18 For the reasons set forth above, the Court **DENIES** Plaintiffs' request to continue the  
 19 discovery cut-off.

20 **IT IS SO ORDERED.**

21 DATED: October 11, 2013

22   
 23 DAVID H. BARTICK  
 24 United States Magistrate Judge  
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27 <sup>4</sup> Local Civil Rule 26.1.a states that "[t]he court will entertain no motion pursuant  
 28 to Rules 26 through 37, Fed. R. Civ. P., unless counsel will have previously met and  
 conferred concerning all disputed issues. . . . If counsel have offices in the same county,  
 they are to meet in person." Section IV(A) of the Court's Civil Chambers Rules contains  
 similar language.